89-1081

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FOLDING CARTON ADMINISTRATION COMMITTEE:
THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN
AND ALEXANDER R. DOMANSKIS,

Petitioners.

VS.

FOLDING CARTON RESERVE FUND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

on behalf of the members of The Folding Carton Administration Committee

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December 11, 1989

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QUESTION PRESENTED

Whether a United States Court of Appeals may *sua sponte* and without the articulation of any standards deny fees for court-appointed officers solely on the ground that the reviewing court disagrees with the goal achieved through their services?

PARTIES TO THE PROCEEDING

Petitioners hereby adopt and respectfully direct the Court to the "Parties to the Proceeding" section set out in full in the Honorable Judge Hubert L. Will's Petition for a Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on December 8, 1989 under the caption *In Re Hubert L. Will* for a complete list of all parties.*

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* Petitioners have designated the Folding Carton Reserve Fund as respondent in this proceeding in order to comply with Supreme Court Rule 33.2(a)(4). However, there is, in fact, no party who is adverse to Petitioner's claim.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, members of the Folding Carton Administration Committee* appointed by the Honorable Judges Hubert L. Will and Edwin A. Robson, respectfully adopt and support the Petition for a Writ of Mandamus or Prohibition filed in this Court by the Honorable Hubert L. Will and the Petition for a Writ of Certiorari filed by the certified plaintiff class. Petitioners further respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *In re Folding Carton Antitrust Litigation*, 881 F.2d. 494 (7th Cir.

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* The members of the Committee are Thomas J. Boodell, Jr., Perry Goldberg, James B. Sloan and Alexander Domanskis, all practicing attorneys in Chicago.

1989), (Will Appendix B)*, which denies attorneys' fees to the Committee for legal work "that related to the second effort to establish an antitrust use for the Reserve Fund" prior to the government's appeal to the court of appeals and also for work "on appeal related to the second effort to establish or defend the research projects for class actions and antitrust." (Will Appendix B, p. 16b). This Court should issue a writ in order to review the court of appeals' decision which in effect penalizes court-appointed officers for fulfilling their judicially-directed duties solely because the court of appeals disagrees with an order entered by the district court which Petitioners served.

Issuance of this writ is necessary to prevent the certain chilling effect the court of appeals' decision will have upon the ability of the district court to obtain willing and competent counsel to assist the court, particularly in complex litigation where such assistance is essential. When reviewing courts determine that appointed and directed officers such as Masters, Receivers, or as in this case, members of an Administration Committee, may not be compensated for work performed because the reviewing court disagrees with the order(s) of the lower court, qualified professionals will no longer be willing to provide these services to the judiciary.

A related issue is the extent of an appellate tribunal's power to preempt the ability of the district court to compensate the officers it appoints. In this case the Seventh Circuit, *sua sponte*, determined that no compensation for certain

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* References to the Appendices filed on December 8, 1989 in the Honorable Hubert L. Will's Petition for a Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, Or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit which was filed with this Court under the title *In re Hubert L. Will* no. 89-927 will be designated "Will Appendix ____." References to the Appendix to this Petition will be designated "Appendix ____"

services could be paid and further failed to articulate any standards by which such a determination was made in this instance or could be made in future cases.

Petitioners respectfully request that this Court issue a writ of certiorari to review the September 11, 1989 order and reverse the court of appeals' decision in regard to the denial of attorneys' fees for work performed at the direction of the district court on the ground that its decision was erroneous as a matter of law, or alternatively, that the court of appeals' decision was not based on any articulated standard.

OPINIONS BELOW

The court of appeals issued the order from which relief is sought on September 11, 1989. (Will Appendix A). The judgment of the district court was affirmed in an order dated August 9, 1989 (Will Appendix C) and an opinion in the case was issued the same day. (Will Appendix B). The August 9, 1989 order was vacated in another order of September 11, 1989. (Will Appendix D). The district court's opinion issued May 24, 1988, on remand from the court of appeals' September 5, 1984 decision, is reported at 687 F. Supp. 1223. (Will Appendix J). Petitions for Rehearing were filed on August 23, 1989. Those Petitions were denied on September 15, 1989.

JURISDICTION

The court of appeals issued the order from which relief is sought on September 11, 1989. Petitions for rehearing were denied on September 15, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and § 1651(a).

STATEMENT OF THE CASE

This appeal grows out of an antitrust claim by 2700 purchasers of folding cartons who sought damages from 24 defendants in a multi-district litigation known as *In re Folding Carton Antitrust Litigation*, MDL-250. A detailed recitation of the background and facts of this litigation is set forth in the opinion of the Honorable Hubert L. Will, *In Re Folding Carton Antitrust Litigation*, 687 F. Supp. 1223 (N.D. Ill. 1988) (Will Appendix J), and in the opinion of the court of appeals below. (Will Appendix B).* The class actions were consolidated in the Northern District of Illinois. After four years of pretrial proceedings and extensive discovery in the original case, the defendants agreed to settle and paid in excess of $200 million into an escrow account.

After the above settlement in the fall of 1979, Judges Will and Robson appointed a panel of attorneys to review all attorneys' fees applications relating to the litigation. After the panel successfully resolved attorneys' fees matters, the district court formally designated the panel an Administration Committee pursuant to MDL-250 Administrative Order No. 1, "to report to the court on the status of claims filed and submit for the court's consideration any other proposals for administration and distribution of the settlement funds."

The Committee eventually recommended payments in excess of $200 million to claimants. After reviewing and substantially approving those payments, the district court solicited recommendations regarding the disposition of the residue of approximately $6 million remaining in the settlement fund.** After receiving recommendations from all

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* Other reported decisions which recite the background of this case are *In Re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091 (N.D. Ill. 1983), *affirmed in part, reversed in part*, 744 F.2d 1252 (7th Cir. 1984).

** The residue resulted from an initial reserve for mistakes and unanticipated costs neither of which occurred, and an extremely favorable investment climate.

parties and the Committee, the district court decided that the residue should first be used to pay late claimants and further that any remaining monies should be used to fund a foundation for research on complex class actions and antitrust issues. *In Re Folding Carton Antitrust Litigation*, 557 F. Supp. 1097, 1112 (N.D. Ill. 1983).

Six of the class claimants and two of the settling defendants appealed the district court's decision. The court of appeals affirmed the district court's holding that none of the appellants were entitled to any of the remaining funds, but reversed the district court's use of the *cy pres* doctrine to establish a research foundation to study complex class actions and antitrust issues. The court of appeals found that that was an "abuse of discretion" because, in its view, further study on the subject was unnecessary. *In Re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254-5 (7th Cir. 1984). Instead, the court of appeals directed that any money remaining after satisfying late claimants should "escheat" to the United States in accordance with 28 U.S.C. §§ 2041, 2042. 744 F.2d at 1256.

Several of the parties petitioned this Court for a writ of certiorari and, at the direction of the district court, the Committee sought a writ of mandamus or, alternatively, a writ of certiorari on behalf of the district judges on the ground that the court of appeals contravened the sound exercise of appellate discretion when it substituted its findings for those of the district court. While those petitions were before this Court, the parties reached a settlement regarding the remaining funds. The Settlement Agreement provided that the residue of the settlement fund was to be used to pay any unpaid class members and remaining funds were to be divided equally between (i) a pro rata distribution to all class members who had previously been paid and (ii) two or more Chicago area law schools "for the purpose of furthering research projects involving analysis and enforcement of the antitrust laws and/or the improved management of complex multi-

party litigation and/or scholarship assistance for needy students." (Appendix, p. 2).

After issuance of the Seventh Circuit's Opinion providing for "escheat" of unclaimed funds to the U.S. Treasury pursuant to 28 U.S.C. §§ 2041, 2042, the government was notified both of its potential interest in the residual fund and of the parties' desire to settle the matter on the terms described above. At the initial hearing on the Settlement Agreement, the district court indicated that it would not approve the Settlement until the court was advised whether or not the government would object. Thereafter, the government indicated that it would not object to approval of the Settlement Agreement. (Will Appendix J, pp. 8j-9j). Upon approval of the Settlement by the district court on March 28, 1985, all petitions pending in this Court were withdrawn.

In accordance with the district court's order, notices were published and late claims were filed and reviewed by the Committee. After payment of late claims and reasonable costs, and payment of one-half of the remainder to class members who had previously received payments, the district court in April, 1987 made initial grants to law schools based upon pending grant applications.

Then, in July, 1987, after the initial grants to law schools were approved and over two years after the Settlement Agreement was approved, the United States filed a Motion to Intervene and to Vacate the Settlement, arguing that the residue should escheat to the government. After full briefing, the district court denied the government's motion. On appeal, the court of appeals affirmed the district court's denial of the government's motion to intervene but nevertheless found that the Settlement's plan to fund research projects was void. The court also ordered that "no fees are . . . to be permitted for any legal work that related to the second effort to establish an antitrust use for the Reserve Fund which is now voided . . . (and) no fees shall be allowed for any legal service on appeal related to the second effort to establish or defend

the research projects for class actions and antitrust." (Will Appendix B, p. 16b).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' ARBITRARY DENIAL OF ATTORNEYS' FEES

In the *Folding Carton* litigation, Judges Will and Robson appointed the Committee to work at the direction and under the control of the court. The district court ordered the Committee to complete many tasks, among these to review attorneys' fees applications, to examine claims and make recommendations for payment, to handle objections to claims and recommend solutions, and to defend the orders of the district court on appeal. The Committee served the district court only in the capacities specified by the court.

When the Committee's members sought compensation for work performed on the district court's behalf, the four members of the Committee filed individual applications with the district court. The district court judges reviewed and approved payment of the Committee members' fee requests after notice and hearing. Although no issue was raised by the government in its aborted motion to intervene, the appellate court, *sua sponte*, determined that no fees should be awarded at the district or appellate levels for work relating to the funding of grants to local law schools for the research of antitrust or complex litigation.

The arbitrary nature of the decision by the court of appeals to deny attorneys' fees for certain work performed constitutes a dangerous precedent. In the litigation before it, the court of appeals only faced the government's appeal from the district court's denial of its motion to intervene; the propriety of attorneys' fees for services rendered to the district

court was not an issue on appeal and was never briefed or argued in the court of appeals.

The decision to award attorneys' fees is ordinarily a question of fact for the district court which determination can be overturned only when the court of appeals finds an abuse of discretion. *Tomazzoli v. Sheedy*, 804 F.2d 93, 97 (7th Cir. 1986). This case presents an uncommon situation where the court of appeals has essentially prejudged the district court's ruling on attorneys' fees before the award is sought or made and without briefs or arguments from the interested parties. The court of appeals' order unfairly penalizes the Committee members without even a hearing on the attorneys' fees issue.

Apart from the procedural unfairness of the ruling, and much more important to this Court's concerns for the administration of justice, the Seventh Circuit's decision also will impair the district court's ability to secure the services of professionals who are willing to work for the judiciary on an *ad hoc* basis. The four members of the Committee, having agreed to serve collectively as officers of the district court, had a reasonable expectation of being fairly compensated for work performed at the court's direction. The possibility that a reviewing court may later deprive the district court of the ability to compensate its appointed officers will discourage the acceptance of such appointments by qualified professionals.

The inequity in the result reached by the Seventh Circuit is best illustrated by examining the basis upon which the court reversed that portion of the Settlement providing for grants to law schools. In its opinion, the court recognized (as the Committee had contended and the district court found), that the government was estopped from intervening in the case and claiming an interest in the residual fund by virtue of its inaction in the face of repeated notices of its potential interest in the fund. (Will Appendix B, pp. 13b-14b). Thus, the court determined that the government had no claim to any portion of the remaining funds. The court then found

that although use of the *cy pres* doctrine was appropriate to determine the manner in which the residual fund would be distributed, this particular application of *cy pres* (agreed to by all parties, including the government) was improper. On remand, the court stated that the district court was free to "consider entirely different and appropriate uses under the *cy pres* doctrine." (*Id.* p. 15b). As an example, the court suggested a grant to the Federal Judicial Center Foundation, "an independent government agency responsible for providing education and training services to all judicial personnel, as well as research and systems development services to the courts, the Judicial Conference of the United States, and to the Congress." (*Id.* at n.8). Thus, the district court's order regarding the residual fund was reversed not because use of *cy pres* was inappropriate as a matter of law, but because, on a philosophical level, the court of appeals disagreed with the *cy pres* purpose to which the remaining funds were devoted. Had the district court directed that a grant be made to the Federal Judicial Center rather than local law schools, the Committee members would have been paid. As a consequence of this difference of opinion as to the need for an antitrust grant, the Committee members are penalized. Compensation is denied not because their work was unsatisfactory or failed any other judicial standard, but because they failed to predict the outcome of the philosophical disagreement between the district and circuit courts regarding the appropriate use of these funds.

Under any view of the facts of this case, the circuit court's determination that the Committee should receive no compensation for services performed on behalf of the district court is arbitrary and should be reversed. Apart from the substantive inequity of the result, it is unquestionably procedurally irregular in that no party had briefed or argued the attorneys' fees issue before the court of appeals. Finally, in its opinion, the Seventh Circuit articulates absolutely no standards applicable to the determination of whether

court-appointed officers should be fairly compensated for their services. This arbitrary determination contributes an element of uncertainty to the task of fulfilling court-directed duties which will most certainly discourage the willingness of the bar to accept such appointments in the future. All of these considerations weigh in favor of reversal of that portion of the Seventh Circuit's opinion which, *sua sponte*, prohibited the payment of any fees to members of the Committee for their efforts in implementing and upholding on appeal that portion of the Settlement Agreement providing for grants to area law schools.

II. THE COMMITTEE MEMBERS, AS COURT APPOINTED OFFICERS, SHOULD BE COMPENSATED ON A QUANTUM MERUIT BASIS FOR ALL WORK DONE AT THE COURT'S DIRECTION

The Administration Committee, appointed by Judges Will and Robson, performed court-directed tasks. Its sole purpose was to create a more manageable case for the district court judges. The four committee members acted as separate, judicially-appointed officers to which the judges could assign certain tasks. In this regard, the Committee members are similar to Masters or Receivers, both of which, of course, are court-appointed, neutral assistants responsible to the court.

This Court has determined that Masters appointed by a court to assist with a case are entitled to fair and reasonable compensation for time spent at the direction of the court. *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1921). In *Newton*, this Court determined that a Master's compensation should reasonably relate to the work done, time employed and responsibilities assumed by the Master. In other words, a court-appointed officer should be compensated on a quantum meruit basis: fair pay dependent on the three variables utilized by the *Newton* Court.

The principle guiding this Court's ruling in *Newton* is that court-appointed assistants work as a neutral force, aiding

the judiciary in the particular litigation at hand. The Committee's work in this case unquestionably saved the district court judges precious time which they could better utilize on other matters. Other courts have recognized the value of the court assistant. *In re Revenue Properties Co. Ltd. Litigation Cases*, 61 F.R.D. 613 (D. Mass. 1974), *vacated and remanded without opinion*, 502 F.2d 1161 (1st Cir. 1974); *American Safety Table Co. v. Schreiber*, 415 F.2d 373 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

The benefits to the judiciary which result from using a Master or administrative aid are likewise present in cases involving court-appointed Receivers. Although the circumstances which demand such an appointment are different, the standards upon which courts determine a Receiver's compensation are the same.

This Court has held that a Receiver's compensation is to be determined by the circumstances of each case, and by taking into consideration the degree of responsibility needed for the case and the Receiver's business experience. *Stuart v. Boulware*, 133 U.S. 78, 82 (1890). Other cases have fashioned similar standards. *Donovan v. Robbins*, 588 F. Supp. 1268, 1272 (N.D. Ill. 1984), citing *In re Westee Corp.*, 313 F. Supp. 1296, 1302 (S.D. Tex. 1970); *In re Yuba Consolidated Industries, Inc.*, 260 F. Supp. 930, 939 (N.D. Cal. 1966).

In *Donovan*, the district court examined a challenge to the Receiver's fees but determined that the fees were due and owing. The court specified that "although the receiver may not have increased the value of the property administered, the receiver diligently and successfully discharged the responsibilities placed upon him by the Court and is entitled to reasonable compensation for his efforts." *Donovan v. Robbins*, 588 F. Supp. at 1273.

Like a Master or a Receiver, the Committee members were court-appointed officers who acted at the direction and

behest of the district court. Their efficient administration of this case resulted in the substantial residual fund which has generated so much controversy. The Settlement Agreement, submitted by the parties and approved by the district court herein only after consultation with all parties and with the government, was the operative document for final resolution of the matters herein. Neither the Committee nor its individual members were parties to the litigation or signatories to the Settlement Agreement. Once the Settlement was in place, the Committee members acted only at the direction of the court to carry out the terms of the Settlement and ultimately to defend the district court and the Settlement Agreement which that court approved. For their services in this regard, the Committee members are entitled to fair and reasonable compensation.

It must be stressed that the Committee members had no position or interest at stake with regard to the Settlement, unlike the claimants seeking compensation or the law schools petitioning for grants. The Committee members now find themselves caught in the middle of a philosophical disagreement between the district court and the court of appeals as to which is the best charity to receive these funds. But the Committee's master is and always has been the district court. The Committee members should not be punished for serving that court loyally, faithfully and with as much skill as was at their disposal.

CONCLUSION

For the foregoing reasons, Petitioners, members of the Folding Carton Administration Committee, respectfully request issuance of the writ of certiorari sought by this Petition.

Respectfully submitted,

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